Supreme Court, U.S.
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No. 90-1969

In The

Supreme Court of the United States

October Term, 1991

REGINA THOMAS WALTON,

Petitioner,

v.

COWIN EQUIPMENT COMPANY, INC.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the Seventh Amendment guarantee a jury trial in a conventional Title VII employment discrimination action in which the plaintiff seeks only injunctive relief and backpay?

LIST OF PARTIES

Regina Thomas Walton
Cowin Equipment Company, Inc.[1]

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[1] Cowin Equipment Company, Inc. is a corporation owned by C&C Holding, Inc., a privately owned Alabama corporation which also owns Cowin & Company, Inc. None of the shares of the three companies are publicly traded.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

UNANIMOUS AND REASONED AUTHORITY REQUIRES A DENIAL OF THE PETITION 5

ARGUMENT 7

EQUITABLE ACTIONS UNDER TITLE VII ARE NOT TRIABLE BY JURY 7

1. *Every Circuit Court of Appeals Holds That Jury Trials Are Not Available in Title VII Cases* 7

2. *Application of the Two-Step Historical Analysis Shows That Jury Trials Are Not Available in Title VII Cases* 8

3. *The Statute and the Legislative History State That Jury Trials Are Not Available in Title VII Cases* 17

4. *Pending Legislation Indicates That Jury Trials Are Not Available in Title VII Cases* 19

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES:

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) .12, 13

Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959) 17

Beesley v. The Hartford Fire Ins. Co., 717 F. Supp. 784, *as supplemented*, 723 F. Supp. 635 (N.D. Ala. 1989) 1

Bibbs v. Jim Lynch Cadillac, Inc., 653 F.3d 316 (8th Cir. 1981) 7

Bonner v. City of Pritchard, 661 F.2d 1206 (11th Cir. 1981) 8

Bouchet v. National Urban League, Inc., 730 F.2d 799 (D.C. Cir. 1984) 7

Bowen v. Massachusetts, 487 U.S. 879 (1988) 11

Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry, 494 U.S. 558, 110 S. Ct. 1339 (1990) 9

City of Los Angeles, Department of Water and Power v. Manhart, 435 U.S. 702 (1978) 12, 13

Clews v. Jamieson, 182 U.S. 461 (1901) 10, 12

Curtis v. Loether, 415 U.S. 189 (1974) 8, 13, 15, 16

Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962) 17

Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989) 16

Great American Savings & Loan Ass'n v. Novotny, 442 U.S. 366 (1979) 5, 6, 8

Harkless v. Sweeny Independent School District, 427 F.2d 319 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971) 10

TABLE OF AUTHORITIES – Continued

Page

Henry v. City of Gadsden, 909 F.2d 1491 (11th Cir. 1990) 8

Hildebrand v. Bd. of Trustees of Michigan State Univ., 607 F.2d 705 (6th Cir. 1979) 7

Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969) 7, 8, 12

Laskaris v. Thornbaugh, 733 F.2d 260 (3d Cir.), *cert. denied*, 469 U.S. 886 (1984) 7

Lehman v. Nakshian, 453 U.S. 156 (1981) 8

Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 1, 4

Ramos (Nixa) v. Roche Products, Inc., ___ F.2d ___, 1991 WL 107756 (1st Cir. 1991) 7

Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1970), *cert. denied*, 404 U.S. 1006 (1971) 7

Sherman v. Burke Contracting, Inc., 891 F.2d 1527 (11th Cir. 1990) 8, 15

Skinner v. Total Petroleum, Inc., 859 F.2d 1439 (10th Cir. 1988) 7, 15

Slack v. Havens, 522 F.2d 1091 (9th Cir. 1975) .. 7, 15, 17

Sullivan v. School Bd. of Pinellas County, 773 F.2d 1182 (11th Cir. 1985) 8

Tull v. United States, 481 U.S. 412 (1987) 9, 16

Wade v. Orange County Sheriff's Office, 844 F.2d 951 (2d Cir. 1988) 7

TABLE OF AUTHORITIES – Continued

Page

Walton v. Cowin Equipment Co., 930 F.2d 924 (11th Cir. 1991) 4, 8

Williamson v. Handy Button Mach. Co., 817 F.2d 1290 (7th Cir. 1987) 7

Wilson v. City of Aliceville, 779 F.2d 631 (11th Cir. 1986) 7, 8

STATUTES:

Civil Rights Act of 1866, 42 U.S.C. § 1981 (1982) 1

Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-5 (1982) ..... *passim*

MISCELLANEOUS:

110 Cong. Rec. 1643 (1964), *reprinted in* 1 *Legis. Hy. of Title VII and XI of the Civil Rights Act of 1964* (1964) 18

H.R. 1, 102nd Cong., 1st Sess., 137 Cong. Rec. H3924 (1991) 19

Rule 38, Fed. R. Civ. P. 2

Rule 50(a), Fed. R. Civ. P. 3

Rule 52, Fed. R. Civ. P. 5

Senate Subcomm. on Labor of the Comm. on Labor and Public Welfare, 92nd Cong., 2d Sess., *reprinted in* 3 *Legis. Hy. of the Equal Employment Opportunity Act of 1972* (1972) 18

STATEMENT OF THE CASE

Plaintiff, a black female, commenced this employment discrimination action against Cowin Equipment Company, Inc. ("Cowin") on February 15, 1989 pursuant to both Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e-2000e-5 (1982), and the Civil Rights Act of 1866 (Section 1981), 42 U.S.C. § 1981. Plaintiff, then an incumbent Cowin billing clerk, alleged widespread racial discrimination in her complaint challenging a variety of Cowin's employment practices. Cowin denied that it discriminated against blacks and denied that it discriminated against plaintiff. Plaintiff failed to demand a jury trial to which she clearly was entitled under Section 1981. Moreover, plaintiff did not demand a jury for her Title VII claim when the complaint was filed.

On August 4, 1989, Cowin moved for partial summary judgment on plaintiff's Section 1981 claims. The trial court granted this motion on September 13, 1989, holding that because plaintiff was an incumbent employee she had no claims under Section 1981 which survived *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989);[2] thus, the only claims remaining for trial arose solely under Title VII. After the pretrial conference, and in apparent response to the district judge's suggestion,[3]

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[2] Plaintiff did not timely appeal the summary judgment on her Section 1981 claims.

[3] This case was tried before the Honorable William M. Acker, Jr. Judge Acker had held shortly before this ruling that jury trials were available in Title VII cases. *See Beesley v. The Hartford Fire Ins. Co.*, 717 F. Supp. 781, 784, *as supplemented*, 723 F. Supp. 635, 652 (N.D. Ala. 1989).

plaintiff demanded a jury trial on September 19, 1989. (*See* Pretrial Order 4) Cowin's motion to strike the jury demand, based both upon established law under Title VII and the waiver provisions of Rule 38, Fed. R. Civ. P., was overruled on October 10, 1989.

Trial commenced on February 12, 1990 in Judge Acker's court. (Tr. 1) Over the repeated objection of Cowin, plaintiff's Title VII claims were tried to a jury. (Tr. 25) Although the precise scope and nature of plaintiff's claims remained elusive, she eventually asserted (1) that she received a discriminatorily lower rate of pay because of her race and (2) that she retaliatorily was transferred to another department (with no loss in pay or other benefits) as a result of her filing her charge of discrimination with the Equal Employment Opportunity Commission. Plaintiff sought backpay to remedy her alleged discriminatorily depressed pay rate and injunctive relief to remedy the alleged retaliatory transfer and future discrimination.

With specific regard to plaintiff's wage claim, plaintiff was classified as a "billing clerk" and was paid at a higher rate than the two other employees in the same classification who were white. (Tr. 163, 266, 391) Consequently, because plaintiff could not establish a disparate pay claim by comparing herself to the other billing clerks, she argued that she would have been paid more if she were white. Plaintiff asked the jury, in effect, to determine a hypothetical rate of pay using a racial "comparable worth" method to fix a pay rate for her. Thus, contrary to plaintiff's characterizations in the Petition, the measure of damages sought by plaintiff was not defined by the

difference in earnings between plaintiff and a white co-worker.[4]

On February 15, the trial court submitted the case to the jury, instructing them in part – over Cowin's objection – that plaintiff could establish her disparate pay claim through circumstantial evidence without having to compare herself with a specific similarly situated white employee. (Tr. 355-59, 566-67, 581) The jury returned a verdict, upon special interrogatories, adverse to Cowin in all respects. (Tr. 586) The jury found that Cowin discriminated against plaintiff and that plaintiff had suffered financial loss in the amount of $14,622.40. (Tr. 587) The jury also found, without any factual basis, that Cowin had retaliated against plaintiff when it transferred her to a different department. (Tr. 587)

Pursuant to Rule 50(a), Fed. R. Civ. P., Cowin moved for a directed verdict at the close of plaintiff's evidence and again at the close of all the evidence. The trial court reserved ruling on both motions and submitted the case to the jury. (Tr. 380, 509) After the jury returned its plaintiff's verdict, the trial court granted on March 14, 1990 a directed verdict in favor of Cowin on plaintiff's retaliation claim but denied Cowin's motion with respect to the disparate pay claim. Cowin's timely Motion For A

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[4] When charging the jury, Judge Acker acknowledged that plaintiff sought, and only could seek, equitable remedies in this case: "[W]hat [plaintiff] is seeking in the way of damages is not damages for pain and suffering or mental anguish. She can't seek that. She's seeking lost wages. . . . She's not seeking either some quantification for hurt feelings or money for punishing the defendant. Those are not permitted." (Tr. 577)

Judgment Notwithstanding The Verdict Or For A New Trial was overruled by the trial court on April 3, 1990.[5]

Cowin filed a timely Notice of Appeal on April 10, 1990, and plaintiff filed a Notice of Cross-Appeal on April 24, 1990. The parties on appeal addressed two principal issues: (1) whether plaintiff's claims under Title VII entitled her to a jury trial over Cowin's objection and (2) whether plaintiff could establish a prima facie case of discrimination in compensation through circumstantial evidence without comparing herself to a similarly situated white employee receiving greater pay. Following briefing and oral argument, the Eleventh Circuit vacated and remanded the verdict and instructed the trial court to treat the case as a proceeding in equity.[6] The Court of

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[5] The trial court's April 3, 1990 Memorandum Opinion denying Cowin's Motion For A Judgment Notwithstanding The Verdict Or For A New Trial dealt exclusively with the jury trial issue in light of appellate opinions issued after the trial in the instant case. As the record makes clear, the trial court is incorrect on page 18 of its opinion when it stated, "plaintiff in the instant case had her § 1981 rug suddenly jerked from under her after she had legitimately demanded a jury trial on issues which, pre-*Patterson*, would clearly have been jury triable. . . ." (Petition A-17) Plaintiff's original February 15, 1989 complaint *did not contain a jury demand*. (Complaint 7) Plaintiff's Section 1981 claims were dismissed when the trial court granted Cowin summary judgment on those claims on September 13, 1989. Plaintiff's jury demand was solicited by the trial court in its Pretrial Order of September 14, 1989. (Pretrial Order 4) Plaintiff then filed her first and only jury demand on September 19, 1989, six days *after* plaintiff's Section 1981 claim was dismissed.

[6] *See Walton v. Cowin Equipment Co.*, 930 F.2d 924 (11th Cir. 1991) (table) (Petition A-29-30).

Appeals further ordered the trial court to enter findings of fact and conclusions of law as required by Rule 52, Fed. R. Civ. P.

UNANIMOUS AND REASONED AUTHORITY REQUIRES A DENIAL OF THE PETITION

Plaintiff correctly observes in her Petition: "The lower courts for the last twenty-five years have consistently denied jury trials in thousands of Title VII actions." (Petition 4) In an even larger number of cases the jury trial issue is not addressed because the issue is regarded as long settled. There is precious little support for plaintiff's assertion that actions brought exclusively under Title VII are triable by jury. Consequently, there is no division of authority on this issue in the circuit courts of appeals or otherwise. Because unanimous authority holds that actions under Title VII are not jury triable and because no recent developments in the law require a reexamination of this authority, the Eleventh Circuit Court of Appeals was correct in reversing the trial court, and the Petition should be denied.

Every circuit court of appeals has spoken on the issue of when jury trials are available in civil rights cases. As recognized by this Court in *Great American Savings & Loan Ass'n v. Novotny*, "Because [Title VII] expressly authorizes only equitable remedies, the courts have consistently held that neither party has a right to a jury trial." 442 U.S. 366, 375 (1979) (noted citations omitted). Every court of appeals continues to hold that jury trials are unavailable

under Title VII. Since *Novotny*, the Eleventh Circuit has so stated five times.[7]

There are no recent developments in Seventh Amendment jurisprudence which require a reexamination of the vast body of law developed under Title VII. Rather, in recent cases in which the Supreme Court considered the application of the Seventh Amendment to statutory causes of action not extant at the time the Bill of Rights was adopted, the Court has restated the two-step historical analysis long applicable to resolving the jury trial issue. This test, which requires an examination of (1) the nature of the claim involved and (2) the type of relief sought, is precisely the same test applied by the courts to the issue under Title VII since its passage in 1964. The Supreme Court's recent decisions concerning the Seventh Amendment confirm that all of the courts of appeals reached the correct result under the historical test by concluding that relief under Title VII is equitable and that the right to a jury trial therefore is not preserved.

In addition to the lack of a split in authority on the jury trial issue and the absence of a reason to reexamine this authority, the statute itself and its legislative history show that Title VII actions were intended to be tried nonjury. Section 706(g) of Title VII refers specifically to "the court" as the fact-finder and to "equitable relief" as the relief available. The legislative history confirms that this language was chosen for a purpose: Title VII actions are not to be tried to juries.

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[7] *See infra* note 10.

Finally, legislation has been introduced several times during the current and previous Congress which would create a right to a jury trial in certain types of Title VII actions. While this legislation has yet to become law, it reflects congressional acknowledgement that jury trials currently are unavailable under Title VII. Supreme Court review is not now appropriate.

ARGUMENT

EQUITABLE ACTIONS UNDER TITLE VII ARE NOT TRIABLE BY JURY

1. *Every Circuit Court of Appeals Holds That Jury Trials Are Not Available in Title VII Cases*

Every circuit court of appeals has addressed the issue of when jury trials are available in civil rights cases. The courts unanimously hold that jury trials are not available under Title VII.[8] The Eleventh Circuit Court of Appeals

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[8] *See Ramos (Nixa) v. Roche Products, Inc.*, ___ F.2d ___, 1991 WL 107756, 5-6 (1st Cir. 1991); *Wade v. Orange County Sheriff's Office*, 844 F.2d 951, 953 (2d Cir. 1988); *Laskaris v. Thornbaugh*, 733 F.2d 260, 263 (3d Cir.), *cert. denied*, 469 U.S. 886 (1984); *Robinson v. Lorillard Corp.*, 444 F.2d 791, 802 (4th Cir. 1970), *cert. denied*, 404 U.S. 1006 (1971); *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969); *Hildebrand v. Bd. of Trustees of Michigan State Univ.*, 607 F.2d 705, 708 (6th Cir. 1979); *Williamson v. Handy Button Mach. Co.*, 817 F.2d 1290, 1293 (7th Cir. 1987); *Bibbs v. Jim Lynch Cadillac, Inc.*, 653 F.3d 316, 318 (8th Cir. 1981); *Slack v. Havens*, 522 F.2d 1091, 1094 (9th Cir. 1975); *Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439, 1443 (10th Cir. 1988); *Wilson v. City of Aliceville*, 779 F.2d 631, 635 (11th Cir. 1986); *Bouchet v. National Urban League, Inc.*, 730 F.2d 799, 805 (D.C. Cir. 1984).

and its predecessor, the former Fifth Circuit,[9] have so held in a long series of cases beginning in 1969, just five years after Title VII was passed.[10] This Court repeatedly has recognized the unanimity of authority on this issue. *See Lehman v. Nakshian*, 453 U.S. 156, 164 (1981); *Novotny*, 442 U.S. at 375; *Curtis v. Loether*, 415 U.S. 189, 196-198 (1974). Because there is no case law which supports plaintiff's assertion that jury trials are available in Title VII cases, there necessarily is no split among the circuits on the issue. The Petition thus should be denied.

2. *Application of the Two-Step Historical Analysis Shows That Jury Trials Are Not Available in Title VII Cases*

Examination of the recently affirmed historical analysis applicable under the Seventh Amendment shows that the Eleventh Circuit was correct in reversing the trial court's grant of a jury trial and that the Petition should be denied. The Supreme Court's most recent statement of the proper Seventh Amendment analysis applicable in determining whether jury trials are available for newly

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[9] The Eleventh Circuit Court of Appeals was created out of the former Fifth Circuit in 1981. Decisions of the former Fifth Circuit rendered on or before September 30, 1981 continue to have binding effect in the Eleventh Circuit. *See Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981).

[10] *See Walton v. Cowin Equipment Co.*, 930 F.2d 924 (11th Cir. 1991) (table) (Petition A-29-30); *Henry v. City of Gadsden*, 909 F.2d 1491, slip op. at 12-13 (11th Cir. 1990) (table); *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527, 1529, note 4 (11th Cir. 1990); *Wilson v. City of Aliceville*, 779 F.2d at 635; *Sullivan v. School Bd. of Pinellas County*, 773 F.2d 1182, 1187 (11th Cir. 1985); *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d at 1125.

created statutory causes of action is in *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 110 S. Ct. 1339 (1990). Justice Marshall described this two-part analysis as follows:

> "First we compare the statutory action to 18th-Century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature." The second inquiry is more important in our analysis.

110 S. Ct. at 1345. (citations omitted). If, after applying this test, the court determines that legal rights are involved, the right to a jury trial is preserved. If the proceeding is in equity, then the Seventh Amendment does not guarantee a jury trial, and a jury is available only if the statute in question so provides. *See id.*

Since there were no actions for employment discrimination in 18th-Century England, and because the most important factor under the proper Seventh Amendment analysis is the nature of the remedy sought, examining various common law causes of action existing prior to the passage of Title VII is of modest help in resolving the inquiry. *Cf. Tull v. United States*, 481 U.S. 412, 421 (1987) (absence of a clear historical analogue further shifts focus of analysis to the nature of the remedy sought). Plaintiff cites in her Petition, however, a variety of causes of action arising out of the employment context which she contends shows that employment discrimination claims are most closely akin to 18-Century actions at law. Simply because employment discrimination claims arise in the employment context (as did the old employment contract cases) does not make the causes of action comparable. In

those employment contract cases money damages were sought based upon the notion of a failure to receive agreed upon payment for services performed or upon some other failure to perform an express or implied agreement. Plaintiffs in those cases did not seek backpay as part of "an integral part of the equitable remedy of injunctive reinstatement." *Cf. Harkless v. Sweeny Independent School District*, 427 F.2d 319, 323-24 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971) (denying jury trial in action under 42 U.S.C. § 1983 when only backpay and other equitable relief was sought). Employment discrimination cases are not analogous to these old employment contract cases. In the case now before the Court, for example, plaintiff seeks a court-ordered change in her wages, retroactively and prospectively, to a rate *not* agreed upon. Specifically, plaintiff asked the factfinder to conjure a wage rate free of purported discriminatory animus. Prior to the passage of Title VII and similar statutes, there just was no legal theory on which an employee could sue his employer for alleged discrimination based upon some protected factor such as race.

A better – but imperfect – historical analogy to plaintiff's claim for disparate compensation is an action for an accounting. This cause of action is an equitable action normally brought against one who stands in a fiduciary relation to another for a breach of that relation. *See, e.g., Clews v. Jamieson*, 182 U.S. 461, 479-481 (1901). Such a claim is similar to plaintiff's compensation claim because plaintiff claims a breach of an obligation (albeit statutory) by Cowin to pay wages on a nondiscriminatory basis. Moreover, the chancellor in an accounting action, like a district judge under Title VII, has both the power and the

obligation to fashion overall equitable relief, including restitutionary and injunctive relief such as placing a wronged plaintiff in his "rightful place." *See id.*

More importantly, an examination of *all* of the cases in the federal courts addressing the second issue since the passage of Title VII, including *Terry*, demonstrates that backpay *under Title VII* is an equitable remedy. *See* 110 S. Ct. at 1349. Thus, the second part of the two part analysis dictates that plaintiff was not entitled to a jury trial in this case. *See id.*

In determining whether money damages are equitable or legal, the Court looks to the nature of the claim for relief. The Supreme Court observed in *Bowen v. Massachusetts*:

> Our cases have long recognized the distinction between an action at law for damages – which are intended to provide a victim with monetary compensation, for an injury to his person, property, or reputation – and an equitable action for specific relief – *which may include an order providing for the reinstatement of an employee with back pay*. [emphasis added].

487 U.S. 879, 893 (1988). The *Bowen* Court then noted that "[t]he fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages.' " *Id.* Finally, of particular relevance to this case (in which the "very thing" plaintiff seeks is wages), the Court stated: "Damages are given to the plaintiff to *substitute* for a suffered loss, whereas specific remedies are not substitute remedies at all, but attempt to give the plaintiff the very

thing to which he was entitled." *Id.* at 895 (emphasis in original).

That backpay under Title VII is equitable in nature is demonstrated by the discretion granted to trial courts under Title VII to determine how to fashion backpay awards. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415-16 (1975). In *Albemarle*, the Supreme Court stated:

> It is true that back pay is not an automatic or mandatory remedy; like all other remedies under [Title VII] it is one which the courts "may" invoke. The scheme implicitly recognizes that there may be cases calling for one remedy but not another, and – owing to the structure of the federal judiciary – these choices are, of course, left in the first instance to the district courts.

Id. (citation omitted). This discretion given to trial judges to invoke backpay as part of an overall equitable remedy under Title VII, implicitly if not explicitly, rejects the notion that a jury should be involved in any way in determining relief under Title VII. This discretionary authority granted to the district courts has been cited as grounds for rejecting jury demands in Title VII cases. *See, e.g., Curtis v. Loether*, 415 U.S. at 197; *Johnson v. Georgia Highway Express*, 417 F.2d at 1125 ("The demand for back pay is not in the nature of a claim for damages, but rather is an integral part of the statutory equitable remedy, to be determined through the exercise of the court's discretion, and not by a jury.").

This Court held in *City of Los Angeles, Department of Water and Power v. Manhart*, that a retirement program that required greater contributions for female employees

than for male employees violated Title VII, notwithstanding reliance upon actuarial tables which demonstrated that women, as a group, live longer than men, thus making funding of retirement more expensive for women than men. *See* 435 U.S. 702, 711 (1978). The Court, however, declined to affirm the lower court's order of retroactive relief (*i.e.*, disgorgement of the "overpayment"), concluding "that the District Court gave insufficient attention to the equitable nature of Title VII remedies." *Id.* at 719. The Court observed (1) that its decision represented a departure from insurance industry practice, (2) that federal administrative agencies had conflicting views, and (3) that retroactive application could affect the retirement fund's solvency with the prospect that innocent third parties would suffer. *Id.* at 718-22. Accordingly, after balancing the equities, the Court denied retroactive financial relief. *Manhart* unambiguously illustrates that the Title VII remedial scheme is wholly equitable in nature. *See also Albemarle Paper Co. v. Moody*, 422 U.S. at 415-16.

On more than one occasion this Court has used Title VII as an example of a statute under which an award of backpay is equitable in nature. In *Curtis v. Loether*, for example, the Court specifically noted that the remedial provisions of Title VII "contrast sharply" with the simple authorization of an action for "actual and punitive damages" under section 812 of Title VIII, the Civil Rights Act's fair housing provisions. 415 U.S. at 197. More recently, in *Teamsters v. Terry*, in which the Court provided for jury trials in breach of fair representation claims against unions, the Court again contrasted legal remedies with equitable remedies such as those under

Title VII. The *Terry* Court held, because a plaintiff union member does not seek *backpay* (an equitable remedy) from his union in a breach of fair representation case (a union cannot "wrongfully withhold" the wages of its members), but rather seeks compensatory *damages* (a legal remedy) for the union's failure to represent him properly, that such plaintiffs are entitled to jury trials against their unions. *Id.* In so holding, the Court went to great lengths *to distinguish* relief under Title VII which "Congress specifically characterized . . . as a form of 'equitable relief' ":

> [T]he Court has noted that backpay sought from an employer under Title VII would generally be restitutionary in nature in contrast to the damages sought here from the union. *Thus, the remedy sought in this duty of fair representation case is clearly different from backpay sought for violations of Title VII.* [emphasis added].

110 S. Ct at 1349 (citations omitted).[11]

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[11] That backpay under 42 U.S.C. § 1981 has been characterized as legal does not support a holding that backpay under Title VII suddenly should be characterized as legal as well. First, over 25 years of judicial precedent has rejected this assertion. More importantly, the equitable remedial scheme under Title VII is totally different from the remedial scheme under Section 1981 under which compensatory and punitive damages can be obtained. The Tenth Circuit, for example, in determining that an action brought pursuant to both Title VII and Section 1981 should be bifurcated, stated: "Under Title VII, a complainant may request back pay commencing not more than two years prior to the filing of his claim with the EEOC, reinstatement, and other affirmative relief as may be appropriate. Because these remedies are equitable in nature, a Title VII

(Continued on following page)

Since the enactment of Title VII in 1964, all of the courts of appeals have determined that relief under Title VII, including backpay, is equitable. *See, e.g., supra* note 8. Plaintiff's contention that backpay sometimes was treated as a legal remedy prior to the passage of Title VII thus is immaterial. Those courts addressing the issue recognize that backpay is considered a legal remedy in some contexts, such as when a loss of earnings is an element of compensatory damages, but they uniformly reject the notion that backpay is a legal remedy for the purpose of Title VII. The Ninth Circuit, for example, rejected the assertion that all awards of money damages must be legal in nature in determining that jury trials are not available under Title VII:

> [T]he [Supreme] Court left little doubt that not all awards of monetary relief should necessarily be characterized as legal for the purposes of the jury trial requirement. Appellants' claim that a jury trial must be afforded whenever any legal characteristic is associated with a primarily "equitable" action fails. Here, the award of backpay is an integral part of the equitable remedy of reinstatement, to consider it apart from that context would be to distort the traditional line dividing legal from equitable remedies.

Slack v. Havens, 522 F.2d at 1094 (citing *Curtis v. Loether*, 415 U.S. at 194; *see also Terry*, 110 S. Ct. at 1339 ("This

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claimant is not entitled to a jury trial. A claimant who establishes a cause of action under § 1981, however, can recover both compensatory and punitive damages, as well as backpay and lost benefits for an unlimited period of time. Since these remedies have been characterized as legal in nature, a claimant is entitled to a jury trial on his § 1981 claim. *Skinner v. Total Petroleum, Inc.*, 859 F.2d at 1443; *see also Sherman v. Burke*, 891 F.2d at 1529, note 4.

Court has not . . . held that 'any award of monetary relief must *necessarily* be 'legal' relief.' ") (emphasis in original).

In light of the foregoing precedent holding that remedies under Title VII are equitable and that the district courts have great discretion under Title VII in fashioning overall equitable relief according to the specific facts in individual cases, further examination of the backpay remedy under Title VII is not necessary. This is especially true since the recent decisions of this Court have not modified the existing framework for Seventh Amendment analysis but simply have applied existing analysis to new statutory circumstances.[12] However, further examination of the backpay remedy as considered recently by the Supreme Court only confirms Cowin's position and all existing prior precedent.

In *Terry*, the Supreme Court noted that damages are equitable (1) when they are restitutionary and (2) when they are incidental or intertwined with injunctive relief. 110 S. Ct. at 1348. First, that backpay under Title VII is restitutionary is not open to rational debate. *See id.* at 1349; *Curtis v. Loether*, 415 U.S. at 197. An award of backpay under Title VII serves to "disgorge improper profits" obtained by an employer while unlawfully discriminating against an employee. *Cf. Terry*, 110 S. Ct. at 1348. Second, that backpay under Title VII is intertwined with injunctive relief is made clear by all of those cases just discussed emphasizing the discretion given to the

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[12] *Cf. Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42-50 (1989) (applying the historical analysis to the Bankruptcy Act); *Tull v. United States*, 481 U.S. at 421 (applying the analysis to the Clean Water Act).

district courts in fashioning overall equitable remedies under Title VII. For these reasons, the backpay sought by plaintiff in this case is equitable relief, and plaintiff consequently was not entitled to a jury trial.[13] The Petition therefore should be denied.

3. *The Statute and the Legislative History State That Jury Trials Are Not Available in Title VII Cases*

The plain language of Title VII states that judges and not juries are to make factual findings under the statute:

> If *the court* finds that respondent has intentionally engaged in . . . an unlawful employment

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[13] Plaintiff cites the *Beacon Theatres, Dairy Queen* line of cases for the proposition that plaintiff was entitled to a jury trial in this case. These cases are inapposite because there was only one issue on the merits in this case: Whether Cowin unlawfully paid plaintiff lower wages because of her race. Thus, there was no possibility of the trial court in this case making a prior factual determination on an equitable claim which subsequently would be binding on a jury relative to a legal claim *because there was and is no other claim. See Slack v. Havens*, 522 F.2d at 1094, note 4. ("Appellants' reliance on *Beacon Theatres, Inc. v. Westover*, (1959) 359 U.S. 500, 79 S. Ct. 948, 3 L. Ed. 2d 988 (holding that where legal and equitable counterclaims are being tried in a single proceeding, jury trial of legal issues should only under the 'most imperative circumstances' be lost through prior adjudication of equitable claim) and on *Dairy Queen Inc. v. Wood*, (1962) 369 U.S. 469, 82 S. Ct. 894, 8 L. Ed. 2d 44 (holding that the mere characterization of an essentially legal issue as 'incidental' to equitable issues should not be used to deny jury trial) is misplaced. These cases involved a joinder of several claims, some legal, some equitable, and not a situation like the one presently before us in which a single cause of action must be characterized as itself legal or equitable.").

> practice . . . [certain relief may be granted]. [emphasis added].

42 U.S.C. § 2000e-5(g). The statute further is unequivocal that judges and not juries are to fashion relief in Title VII cases:

> *[T]he court* may enjoin the respondent from engaging in such unlawful employment practice. . . . [emphasis added].

Id. Finally, examining the designated relief available in cases brought pursuant to Title VII reveals that the only relief intended by the statute is equitable relief:

> [T]he court *may enjoin* the respondent from engaging in such unlawful employment practice, and *order such affirmative action* as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . , *or any other equitable relief as the court deems appropriate.* [emphasis added].

Id. Clearly, there is no support in the plain language of Title VII for granting plaintiff's Petition.

The legislative history of Title VII demonstrates that Congress believed that race discrimination cases were not appropriate for trial by jury. During the floor debates concerning Title VII in 1964, both houses noted that jury trials were not provided for in the statute and that actions brought pursuant to it were not to be tried to juries. *See* 110 Cong. Rec. 1643 (1964), *reprinted in* 1 *Legis. Hy. of Title VII and XI of the Civil Rights Act of 1964* 3258 (1964). In 1972 when Title VII was amended, an amendment was proposed to add a right to a jury trial under Title VII. *See* Senate Subcomm. on Labor of the Comm. on Labor and Public Welfare, 92nd Cong., 2d Sess., *reprinted in* 3 *Legis.*

Hy. of the Equal Employment Opportunity Act of 1972 1719 (1972). This amendment was rejected, again on the grounds that actions under Title VII are equitable in nature. *See id.* Thus, there is nothing in Title VII or its legislative history to warrant the Court's reconsideration of the settled jury trial issue under Title VII.

4. *Pending Legislation Indicates That Jury Trials Are Not Available in Title VII Cases*

Currently pending in Congress is H.R. 1, S. 1407, S. 1508, and S. 1409 (successors in various forms to the Civil Rights Act of 1990 introduced during the previous (101st) Congress) which, if passed, would grant jury trials in Title VII actions if the newly provided remedies of compensatory or punitive damages are sought. *See, e.g.*, H.R. 1, 102nd Cong., 1st Sess., 137 Cong. Rec. H3924, § 106(a)(B) (1991). Such provisions in the bills obviously are premised upon the widely held understanding that jury trials currently are not available under Title VII. Plainly, this Court need not grant the Petition when there remains a possibility that the underlying statute eventually may be amended. The potential waste of judicial resources is not justified.

CONCLUSION

The Court should deny the Petition because the law is settled and no constitutional issue is implicated.

Respectfully submitted,

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